Canada Industrial Relations Board Conseil canadien des relations industrielles

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# Reasons for decision

Maritime Employers Association,

*applicant,*

*and*

Rideau Bulk Terminals Inc.,

*respondent,*

*and*

International Longshoremen's Association,
Local 1654,

*intervenor.*

Board File: 27956-C
Neutral Citation: 2011 CIRB **608**
September 29, 2011

The Canada Industrial Relations Board (the Board), composed of Mr. William G. McMurray, Vice-Chairperson, and Messrs. John Bowman and Patrick J. Heinke, Members, considered the above-noted application. The Board conducted case management teleconferences on October 7 and 19, 2010 and November 8, 2010. A hearing took place in Toronto on October 21 and 22, 2010, and February 15 and 16, 2011.

**Appearances**

Mr. John Mastoras, for the Maritime Employers Association;

Mr. Alain R. Pilotte, for Rideau Bulk Terminals Inc.;

Mr. Ronald A. Pink, Q.C., for the International Longshoremen's Association, Local 1654.

These reasons for decision were written by Mr. William G. McMurray, Vice-Chairperson.

**I–Introduction**

[1] On February 16, 2010, the Maritime Employers Association (the MEA or the applicant) filed an application with the Board, pursuant to sections 21, 34(5), 34(5.1) and 34(7) of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*). A geographic certification is in effect for the longshoring industry in the Port of Hamilton. It has been in effect since 1991. The MEA is, pursuant to that geographic certification, the appointed employer representative. The International Longshoremen's Association, Local 1654 (the ILA), is the certified bargaining agent. The MEA alleges that Rideau Bulk Terminals Inc. (RBT or the respondent) was an employer engaged in longshoring and other activities at the Port of Hamilton. More specifically, the MEA alleges that employees of RBT were engaged in longshoring activities at Pier 22 at the Port of Hamilton on or about December 16, 2009, when the M.V. Agawa Canyon, a self-unloading vessel, discharged a cargo of salt in bulk at Pier 22 and when the M.V. Algosteel did the same on or about December 26, 2009. Accordingly, the MEA asserts that RBT is required, like all employers subject to the geographic certification, to pay various assessments to the MEA.

[2] RBT denies that its employee, although present at Pier 22 at all material times, was engaged in longshoring work. RBT denies that it is an employer engaged in the longshoring industry at the Port of Hamilton and therefore asserts that it owes no assessments to the MEA. RBT admits that salt was discharged at Pier 22 from those two self-unloading vessels on the dates claimed. RBT admits that one of its employees was present at Pier 22 throughout the unloading process and further admits that its employee communicated with the ship throughout the unloading process in order to direct the ship on the placement of the conveyor boom. The purpose of these directions, according to RBT, was to ensure that the salt was discharged from the vessel onto the correct location and in the correct

shape, on the pier. RBT admits that the employee returned to the pier the next day and spent several hours operating a bulldozer to level the pile of salt. RBT says that it is a local work and that its labour relations are not subject to federal jurisdiction.

[3] By way of remedy, the MEA is seeking a declaration that RBT must pay the assessment and other charges to the MEA in its capacity as the employer representative pursuant to the geographic certification at the Port of Hamilton. Among other things, the MEA is also seeking an order compelling RBT to pay the MEA "the full legal costs" associated with this application.

[4] For the record, the MEA also named the "Waterford Group" as a respondent to the application related to the discharge of a vessel at the Port of Hamilton on December 10, 2009. The MEA and the Waterford Group advised the Board, on the first day of the hearing, that they had resolved the differences between them. Accordingly, the hearing proceeded with RBT as the sole respondent.

**II–Issues to be Determined**

[5] At the conclusion of the hearing, the following issues remained to be determined by the Board:

1. Whether the subject RBT activities come within the intra provincial shipping exemption;

2. If not, whether the work performed by the employee of RBT at Pier 22 at the material times was or was not longshoring;

3. If so, whether RBT is an employer engaged in the longshoring industry within the meaning of the geographic certification order dated March 8, 1991?

4. If so, what remedy is appropriate?

5. If a remedy is warranted, does the Board have jurisdiction to award legal costs?

**III–Determinations**

[6] Having considered all of the submissions on file and all the evidence and arguments at the hearing, the Board finds and determines, for the reasons that follow:

- that the vessels which transported salt from Goderich, Ontario, and which discharged it on December 16 and 26, 2009, at Pier 22 at the Port of Hamilton were engaged in the interprovincial and international transportation of goods by water and that, therefore, neither the cargo nor RBT's handling of it comes within the scope of the intra provincial shipping exemption;

- that RBT and its employees were, at all material times, engaged in longshoring activities at the Port of Hamilton within the scope of the geographic certification order in the longshoring industry dated March 8, 1991, and that the subject longshoring activities included, but were not necessarily limited to, directing the placement of the piles of salt on the pier and the subsequent and related activity of using a bulldozer to level the piles;

- that the MEA will have, in part, the remedy that it is seeking;

- that the Board reserves its determination as to an award, if any, of costs;

- that the Board retains jurisdiction over all of the matters in dispute.

**IV–Relevant Law**

**A–Statutory Provisions**

[7] Given the objection that RBT raises to the jurisdiction of this Board, it is useful to refer to sections 2(*a*) and 4 of the *Code*, both of which expressly refer to employees employed "on or in

connection with" a federal work or undertaking. Section 4 of the *Code* specifies that Part I of the *Code* applies in respect of employees who are employed on or in connection with the operation of any federal work or undertaking:

> 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

[8] Section 2 of the *Code* defines federal work, undertaking or business and refers, at section 2(*a*) to a work carried on for or in connection with navigation and shipping:

> 2. In this Act,
>
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> (*a*) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

[9] The applicant cites and relies upon section 21 of the *Code*, as well as upon sections 34(5), 34(5.1) and 34(7) of the *Code*.

[10] Section 21 of the *Code* enables the Board, among other things, to enforce compliance with the provisions of Part I of the *Code*:

> 21. The Board shall exercise such powers and perform such duties as are conferred or imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board.

[11] Section 34 of the *Code* addresses geographic certification, primarily in the longshoring industry. One part of a geographic certification order involves the appointment of a representative of the employers engaged in the longshoring industry within the area of the geographic certification. It is not contested that the MEA is the duly appointed employer representative for the Port of Hamilton.

[12] Section 34(5) of the *Code* specifies, among other things, that the employer representative has the power and the obligation to discharge all the duties and responsibilities of all of the employers:

> 34.(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.

[13] Section 34(5.1) of the *Code* enables the employer representative to collect, from the employers, "the costs" it incurs in exercising its statutory duties as employer representative:

> 34.(5.1) The employer representative may require each employer of employees in the bargaining unit to remit its share of the costs that the employer representative has incurred or estimates will be incurred in fulfilling its duties and responsibilities under this Part and under the terms of the collective agreement.

[14] Finally, section 34(7) of the *Code* empowers and obliges the Board to determine any questions that arise regarding the geographic certification:

> 34.(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative.

**B–Key Judicial Decisions**

[15] This is not the first time the Board has been called upon to determine whether the activities of employees constitute longshoring and whether, therefore, their employer falls within the scope of a geographic certification at a port. The description of the bargaining unit in a geographic certification is, by necessity and design, generic in nature. That generic description gives rise to questions regarding the scope of the unit.

[16] In these cases, the Board's analysis of the scope of section 34 of the *Code* invariably begins with the observation that "longshoring," a term used within section 34 of the *Code*, is not a defined term. Longshoring and stevedoring are often considered to be synonymous.

[17] The Board's analysis also inevitably addresses two key judicial decisions: *Reference re: Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529 (the *Stevedoring Reference of 1955*); and *Cargill Grain Company Limited, Gagnon and Boucher Division* v. *International Longshoremen's Association, Local 1739, et al.* (1983), 51 N.R. 182 (F.C.A., no. A-799-81) (the *Cargill* case).

[18] In the *Stevedoring Reference of 1955*, the Supreme Court of Canada confirmed that the federal government did have jurisdiction to legislate in the area of labour relations for employees employed on or in connection with the operation of federal works and undertakings. It also held that stevedoring comes within the scope of the exclusive federal jurisdiction over navigation and shipping at section 91(10) of *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 (formerly the *British North America Act, 1867*). The Court held that the statutory words "on or in connection with" applied only to work that was an integral part of, or necessarily incidental to, the operation of an enumerated federal undertaking, such as navigation and shipping (pages 564 and 566). Those statutory words did not, therefore, capture or apply to persons "performing merely casual services" upon or in connection with a federal undertaking (page 556). However, throughout its reasons for decision, the Court spoke repeatedly of the loading and unloading of ships, an activity it characterized as:

- an essential part of the transportation of goods by water (pages 541; 572 and 591)
- an integral part of shipping (page 584)
- part and parcel of the activities essential to the carriage of goods by sea (pages 537 and 578)

The loading and unloading of ships was identified as stevedoring when performed by persons other than members of the ship's crew (page 591). The transportation of goods by water by means of ships was identified as an operation entirely dependant on the services of stevedores (page 543).

[19] In the *Cargill* case, the Federal Court of Appeal held that there are exceptions to the scope of stevedoring: not all work performed by employees sorting, handling and storing cargoes on the wharf of a port constitutes stevedoring. The *Cargill* case also provided a judicial definition of longshoring. The reasons for decision of Mr. Justice Hugessen allowed that longshoring could be defined

according to the ordinary meaning of the word, which, he said, is "basically the operation of loading and unloading ships." In the same paragraph of his reasons, he added:

> [36] In some cases, as ancillary to this principal operation, it may also include the handling and storage at dockside of goods which have been loaded or unloaded. But surely that does not mean that all handling and storage at dockside is necessarily longshoring, especially when such operations are carried out as ancillary to other activities which have nothing to do with the loading or unloading.

**C–History of the Geographic Certification at the Port of Hamilton**

[20] It is also instructive to look at the history of the geographic certification at the Port of Hamilton.

[21] The first time the ILA applied for a geographic certification at the Port of Hamilton, the application was dismissed (see *Maritime Employers' Association* (1984), 56 di 162 (CLRB no. 470)) (CLRB decision 470). The reasons for decision note that the Hamilton Harbour Commissioners expressed a concern that a geographic certification would bestow upon the MEA and the ILA what the Commissioners called "a virtual, perpetual monopoly on all longshoring work and employment not specifically excluded" (see page 165).

[22] At that time, the Canada Labour Relations Board (CLRB) expressed its concerns over the potential consequences of a geographic certification:

> As a matter of principle, except where strong considerations dictate otherwise, this Board believes that monopolies under section 132 [now section 34] should be avoided.
>
> (page 169)

[23] The CLRB therefore dismissed the ILA application, stating that it was not persuaded that there was any pressing industrial relations advantage for the public interest in applying section 132 [now section 34] in Hamilton (see page 171).

[24] Although the ILA did not succeed in obtaining a geographic certification in 1984, in 1985, the CLRB did grant the ILA what it called a "regular certification." The Board certified the ILA as the bargaining agent for "all employees of member employers of the Maritime Employers' Association

employed as longshoremen in the Port of Hamilton" (Board file no. 551-57 - order no. 4556-U dated May 13, 1985).

[25] The Board subsequently commented that the above bargaining unit description had the "flexibility" of making it possible for the ILA to claim bargaining rights for any new members of the MEA, but was not "open-ended" in the sense of sweeping in any and all possible future employers of longshoremen in Hamilton that might not wish to become affiliated with the MEA. Although the CLRB did not use the exact word, in retrospect, it is clear that its 1985 decision was addressing and responding to the Harbour Commissioners' concern noted in its 1984 decision over the apparently adverse effects of an ILA and MEA "monopoly" at the port.

[26] That situation changed a few years later.

[27] In December 1989, the ILA applied to the CLRB to revise and vary CLRB decision 470, which denied it the geographic certification it was seeking in 1983. The ILA application in 1989 was prompted by a request from a stevedoring employer at the port not associated with the MEA to negotiate a distinct collective agreement with the ILA. Faced with that situation, the Board, in *Maritime Employers' Association et al.* (1991), 84 di 161 (CLRB no. 857), decided that a geographic certification was now appropriate:

> With the likelihood of another stevedoring contractor not allied to the MEA entering the scene and making separate collective agreements with the ILA locals, there now appears in prospect on the Hamilton waterfront just the kind of confused and possibly unstable collective bargaining situation that section 34 was intended to prevent. The purpose of this section is to provide for consolidated employer bargaining, thereby minimizing the number of possible friction points and the general potential for instability. It is intended to eliminate the possibility of whip-sawing by a union and destructive undercutting by employers within an industry based upon collective bargaining or even non-union advantages; it seeks to ensure that the costs and benefits associated with dealing with a single labour pool are equally shared and that the members of that pool have an optimum opportunity to work and earn.
>
> (page 167)

[28] The Board notes that the above decision does not use the word "monopoly" as it did in the 1984 decision, the CLRB referring, however, to the "single labour pool" created by the geographic

certification order.

[29] In *Maritime Employers' Association et al. (857)*, *supra*, the CLRB also went out of its way to try to assure the parties what work was within the scope of the new geographic certification and what work was not:

> It must be understood that, in using the term "longshoring industry," in the port of Hamilton, the Board intends not to draw into the certification order employers who are not in the business of longshoring, but do send out or receive products on their own account via vessels which are loaded or unloaded by their own employees. The intention is to apply the certification order in the port of Hamilton to those who are in the business of contracting to load or unload ships for others for remuneration. At this time, it will in practice apply only to the MEA members, the HHC and Seaway Terminals. Thus, for example, Stelco, which, as far as we know, is in the steel-making business, does not itself become part of the longshoring industry when its employees unload ore or coal from vessels or alternatively load steel onto ships on its own account. Stelco and the many other similarly situated enterprises that use the port will not be affected by the Board's decision. The Board was told that the actual amount of tonnage handled by the "longshoring industry" in Hamilton is very small; the vast bulk is cargo handled on their own account by firms like Stelco, United Co-operatives and many others.
>
> (page 168)

[30] In terms of explaining what was excluded from the scope of the geographic certification order, the Board notes the references in the above quotation to "Stelco and the many other similarly situated enterprises" that are known to be located at the port and that use their own employees to load or unload vessels "on [their] own account." The Board said, in that quotation, that those enterprises were not affected by the Board's decision to grant a geographic certification.

[31] In terms of explaining what was included in the scope of the geographic certification order, the Board notes the sentence in the extended quotation above, that it will apply "to those who are in the business of contracting to load or unload ships for others for remuneration."

**V–Evidence**

[32] At the case management teleconference, it was agreed that RBT would present its evidence first, primarily because RBT raised a jurisdiction argument: it argued that its activities at the

Port of Hamilton fell solely within the intra provincial shipping exemption and therefore fell outside the scope of the *Code*.

[33] RBT called two of its employees as witnesses: Mr. Alain Lefebvre, General Manager of RBT, and Mr. Gord Bennett, a scale operator employed by RBT and the person present at Pier 22 on December 16, 2009, when the salt was being discharged from the M.V. Agawa Canyon.

[34] The MEA led no *viva voce* evidence. It did, however, file affidavit and documentary evidence, on consent. The three affidavits were sworn by Mr. Ian Hamilton of the Hamilton Port Authority, by Ms. Karen Watt, Human Resources Manager, Algoma Central Corporation, and by Mr. Wayne Hennessy of Seaway Marine Terminal.

[35] As will be discussed in greater detail below, RBT agreed to the admission of the three affidavits on condition that the MEA and the ILA agreed that the contract of carriage for the salt at issue ended when the salt left the end of the boom during the discharge operations.

[36] The ILA called one witness, Mr. Patrick Murphy, Vice-President of the Atlantic Council district of the union.

[37] Through the agreement of the parties, RBT was permitted to cross-examine two witnesses who had not been called to give evidence in chief: Mr. Richard Smith of the ILA and Mr. Normand Daoust, Vice-President, Administration, and Secretary of the MEA.

[38] The Board has summarized only those portions of the evidence it considered immediately relevant to the issues to be determined.

**A–Documentary Evidence**

[39] The documentary evidence readily provides that RBT's primary business is the "handling" of road salt in bulk for three major customers. The "handling" of road salt extends to and includes

"unloading" salt at a port from a self-unloading vessel. RBT argues that its activities of unloading vessels, or at least the type of unloading that it performs, does not form a part of the activity of longshoring. Prior to the subject activities at the Port of Hamilton, RBT operated in four ports and two inland terminals in the Province of Ontario.

[40] On its Website (exhibit 5, tab 35), RBT refers to its broad experience in handling and warehousing rock salt and aggregates; one page of its Website is entitled "Vessel unloading/loading St-Lawrence SeawayGreat Lakes." That same page includes a photograph of a vessel at a port, a conveyor and a pile of bulk commodity, presumably rock salt.

[41] A press release issued by its corporate parent on October 26, 2009 (exhibit 5, tab 36), provides that RBT's main activity is "to receive road salt from self-unloaders, and occasionally from bulkers, and do the stockpiling, storage and truck loading for the three major salt companies serving eastern Canada." (The evidence was that RBT has not received any salt from a "bulker" in recent memory).

[42] By letter dated June 1, 2009 (exhibit 1, tab 1), RBT quoted Sifto a price "for handling your salt at the Hamilton pad" for a five-year period. It is undisputed that the Hamilton pad is, in fact, Pier 22. The letter states that, "[in] the first year 2 vessels or approximately 55,000 MT of salt will be unloaded next to the dock wall and tarped at that location." The price that RBT quoted to Sifto was for handling the salt, other than tarping. Tarping was to be performed by another party. Among the conditions listed in the price quotation, RBT stated:

> As instructed by the representative of the Port of Hamilton, a stevedore from the port might have to be on site to unload vessels only. We would also have someone there to unload the vessel.

[43] Finally, when RBT invoiced Sifto (exhibit 1, tab 9) for the work performed related to the discharge of road salt from the vessel M.V. Agawa Canyon on December 16 and from the vessel M.V. Algosteel, which arrived at port on December 26, 2009, the description of the work on the invoice read as follows:

> To receive and unload vessel load of road salt...

[44] In his examination in chief, Mr. Lefebvre, General Manager of RBT, indicated that RBT understands the term "unloading" to mean receiving the cargo at issue from a self-unloading vessel. RBT argues that this is something different than the unloading of the vessel by a stevedore.

**B–Evidence of RBT's General Manager**

[45] The Board heard from Mr. Alain Lefebvre, General Manager of RBT. He first gave the Board an overview of RBT's general operations throughout Ontario. He has held the position of General Manager since November 2009. It appears that he received the job shortly after Logistec Corporation purchased RBT. He had been previously employed for some 27 years by Logistec Stevedoring Inc.

[46] The principal place of business of RBT is in the town of North Gower, south of Ottawa, Ontario. It operates elsewhere throughout the province, but all of its operations are within the province of Ontario. Mr. Lefebvre stated that RBT's main business is the handling and monitoring of piles of road salt for three primary customers.

[47] RBT handles and monitors the salt piles from various terminals located in Morrisburg, Ontario, Johnstown, Ontario, Picton, Ontario, and Toronto, Ontario. All of these activities take place at or adjacent to the port in those cities. RBT also operates terminals in North Gower, and a transfer yard located within a railyard in the city of Ottawa.

[48] RBT's three main customers for the handling of road salt are commonly known as Canada Salt, Cargill and Sifto.

[49] Mr. Lefebvre emphasized to the Board that the manner in which RBT handles and monitors road salt, primarily discharged from self-unloading vessels, at all of these terminals in or adjacent to a port within Ontario is in exactly the same manner it handled the activities that took place in December 2009, at Pier 22 at the Port of Hamilton.

[50] According to Mr. Lefebvre, all of the salt that RBT monitors arrives at the port in a self-unloading vessel. He described the self-unloading vessel as a vessel with a conveyor belt that can

unload the cargo by itself. He added that this conveyor could be in excess of 100 feet long. Mr. Lefebvre mentioned that no personnel is needed to unload this type of vessel and the vessels are discharged by the crew of the vessel.

[51] Mr. Lefebvre stated that an RBT employee contacts the ship to find out when it is likely to arrive at port. The RBT employee goes to the site to show where RBT wants the salt to be put as it is unloaded from the self-unloading vessel. The RBT employee collects a copy of the bill of lading. RBT employees are sometimes, but not always, involved in "tarping" the salt pile. Sometimes, RBT's customers hire another party to do the tarping.

[52] Mr. Lefebvre submitted that RBT can also be involved, from time to time, in "back piling." That activity involves moving the pile of road salt to another location once it has been discharged from a self-unloading vessel. No back piling was done at Pier 22.

[53] When asked by counsel for RBT to describe the interaction of the RBT employee at the port with the self-unloading vessel, Mr. Lefebvre replied "we tell them the spot to put the pile [of salt]." The RBT employee is there, he said, to guide the ship during the discharge of the salt to make sure the cargo is not overflowing the perimeter of the pier. He said that the self-unloading vessels can discharge 2000 to 3000 tons of salt per hour. He claimed that, at most ports, RBT does not care about the height and the width of the pile because the pile eventually gets moved. RBT is involved in subsequently levelling the pile of salt to ensure that the pile is properly protected.

[54] Mr. Lefebvre said that, during the discharge, the RBT employee will tell the ship how and where to swing the boom.

[55] He emphasized that it is not RBT's task to survey the commodity. He also emphasized that there is no exchange of documents between the RBT employee and the ship, other than the bill of lading. The RBT employee obtains a copy of the bill of lading from the crew of the ship, primarily for billing purposes.

[56] The salt, for the most part, all arrives by ship. One exception can be in Winter. If there is a shortage in a given salt pile, then additional salt may have to be trucked to the pile.

[57] Mr. Lefebvre informed the Board that the Sifto salt mine is located in Goderich, Ontario, the Canada Salt salt mine is located in Windsor, Ontario, and the Cargill salt mine is located on the "US side." The salt that was discharged at Pier 22 on December 16 and 26, 2009, had been loaded into the vessel at Goderich.

[58] Mr. Lefebvre reiterated that, from the perspective of RBT, the RBT employee who attends at the pier during the discharge of the salt has "nothing to do with how the vessel is unloaded." Mr. Lefebvre emphasized that the RBT employee has no involvement in the docking or the mooring of the ship. Moreover, the ship normally leaves the port immediately after the cargo is discharged and before the work of levelling or tarping the pile is concluded.

[59] As a general rule, RBT is not involved in loading self-unloading vessels at any of its locations. The one exception is at the Johnstown, Ontario, terminal, where RBT has been known to load aggregates (not road salt) onto a self-unloading vessel.

[60] When one of its customers does engage RBT to tarp the pile of salt, four to six people are involved in the operation. The entire process takes four to five hours of work to complete. Alternatively, this work can be done, as stated, by an outside contractor. Mr. Lefebvre stated that Sifto, in particular, uses an outside contractor for the tarping operation. Sifto is the leasee of the pier at Pier 22.

[61] At the Johnstown location, the salt company customers rent some space at the port. The work that RBT does for Cargill in Johnstown is somewhat different since Cargill uses the space as a transfer pad only, and RBT is responsible to move the salt elsewhere after it is discharged from the self-unloading vessels. More specifically, at this location, the salt is back piled across the street to a terminal leased by RBT's customer.

[62] North Gower is one of the RBT inland sites. Mr. Lefebvre described it as an inland terminal. More specifically, salt from the Cargill company may be transported by truck from the transfer pad in Johnstown, Ontario, to North Gower. Cargill, not RBT, hires the trucking company.

[63] Mr. Lefebvre's evidence was that road salt constitutes about 95% of the total cargo handled by RBT in a year and about 95% of its total annual revenues. The other 5% of its activities consist of handling wood pulp, lumber and other commodities in bulk at the transfer yard in Ottawa, as well as loading some aggregates for export at Johnstown, Ontario. It is understood that the aggregates loaded into self-unloading vessels in Johnstown may move inter provincially and internationally. He emphasized that, when RBT is engaged in loading aggregates into a self-unloading vessel at Johnstown, it is under contract with the owner of the cargo, not under contract with the ship.

[64] Mr. Lefebvre also gave evidence specific to the operations of RBT at the Port of Hamilton.

[65] He said that he was familiar with the subject matter of the MEA application and he was familiar with the RBT activities that took place in December 2009 and in the first months of 2010 at the Sifto terminal at Pier 22. He emphasized that RBT does not own Pier 22 nor does it lease space at Pier 22. According to his knowledge, Sifto has leased the pier from the Port of Hamilton for Sifto's exclusive use. RBT does not handle any other commodities at Pier 22. Mr. Lefebvre did not know, as of the date of the hearing, whether Sifto still leased the space at Pier 22. He also emphasized that RBT had no prior activity at Pier 22 and has had no subsequent activity there either.

[66] Mr. Lefebvre was of the view that RBT had no written contract with Sifto for the work RBT performed on Pier 22. He did, however, put into evidence a letter from the then President of RBT to Sifto (exhibit 1, tab 1). He stated that RBT knew in advance that the Sifto salt to be discharged at Pier 22 in Hamilton was always coming from the Sifto mine in Goderich, Ontario. Mr. Lefebvre's perspective was that the RBT activities for Sifto in Hamilton would be essentially the same as the RBT activities for Sifto at the Port of Toronto. He said that the Sifto activities at Pier 22 did not involve back piling. In his view, Pier 22 represented the final place of rest of the cargo discharged from the self-unloading vessel.

[67] According to him, the work done by RBT for Sifto at Pier 22 totalled 348.5 hours of work and the work performed by RBT employees during the discharge of the salt represented only 4.4% of the total hours on site.

[68] Mr. Lefebvre stated that the small percentage of time spent during the discharge of the salt at Pier 22 is representative of the percentage of time spent by an RBT employee during discharge of a cargo at other ports in Ontario where RBT operates.

**C–The Events of December 16, 2009**

[69] The Board also heard from the RBT employee who was present at Pier 22 on December 16, when the salt was discharged. Mr. Bennett has been working for RBT primarily as a scale operator for nine years. He had previously been employed at Cargill, in a similar capacity, for ten years.

[70] He attended at Pier 22 at the Port of Hamilton on December 16, 2009, to meet the vessel M.V. Agawa Canyon. According to his usual practice, he spoke to the crew of the vessel on the telephone a few hours before the vessel was scheduled to arrive at the port. According to his statutory obligations regarding safety at the port, he arrived at the Pier approximately one hour before the vessel. He used this time to perform various security checks.

[71] Once the vessel arrives, he is not involved in mooring or docking the vessel. Two members of the ship's crew come down to put the lines on. The first mate then provides Mr. Bennett with a ship's radio (walkie-talkie). He uses the walkie-talkie while the salt is being unloaded from the vessel to remain in communication with the crew of the ship. More specifically, he uses it to speak and give directions to the person on board the ship operating the conveyor system (also called the boom), which is used to unload the salt in bulk from the hold of the vessel onto the pier. Mr. Bennett said that he uses the ship's walkie-talkie to give direction to the ship's boom operator as to the movement of the boom, such that the salt is kept in piles within certain areas on the pier. Among other reasons, this is done to assist in subsequent tarping operations. Based on the bill of lading, over 21,000 metric tons of bulk road salt were discharged from the M.V. Agawa Canyon on December 16, 2009. Mr. Bennett's evidence was that the cargo took six to seven hours to discharge,

that he was on the pier the whole time and that he remained in contact with the boom operator for the entire time.

[72] Mr. Bennett said that he uses the walkie-talkie to let the boom operator know when and where to move the boom. He also said that he tells the boom operator to move the boom up or down, in or out; he stated "that's all I do."

[73] Once the pile of salt is on the pier, Mr. Bennett collects his pylons, performs various security tasks and locks the gate behind him to return to Toronto. He returns to Pier 22 the following day to operate a small bulldozer that he uses to shape and to level the pile of salt. This process takes him a couple of hours to complete. The next step in the discharge process, according to Mr. Bennett, is to place a tarpaulin over the salt pile to protect it from the elements. On this occasion, neither Mr. Bennett nor any other RBT employee was involved in the tarping of the salt pile.

[74] Through his evidence, Mr. Bennett also advised the Board that, during the period while the salt was being discharged, he received a visit at the pier from Mr. Smith of the union. The two of them spoke for a period of five to ten minutes. Subsequently, Mr. Bennett spoke with Mr. Walsh of the MEA. Mr. Bennett arranged for Mr. Walsh to speak with Mr. Lefebvre, General Manager of RBT. That telephone discussion apparently lasted some 15 to 20 minutes.

[75] Mr. Bennett did not attend the port on December 26 for the unloading of the road salt from the M.V. Algosteel. Another RBT employee did. The process that was followed was essentially identical.

[76] The process described above to discharge road salt in bulk from a self-unloading vessel is apparently the same process that RBT uses when other self-unloading vessels arrive at the Port of Toronto to discharge cargos of road salt in bulk.

**D–Other Evidence**

[77] The Board also heard evidence regarding the discharge of bulk commodities from self-unloading vessels at other ports in Canada, including the Port of Hamilton and the relationship, if any, of work there with the ILA labour. None of these examples involve RBT or RBT's employees. Much of this evidence was obtained by the MEA through cross-examination.

[78] Although RBT operates in a number of ports in Ontario, and although it handles salt for its customers at these ports, the only such port that is subject to a geographic certification order of this Board is the Port of Hamilton.

[79] Self-unloading vessels discharge road salt at the Port of Hamilton, although not at Pier 22, for Cargill. Union labour is involved in the discharge process. The Board is referring here to the discharge of road salt from self-unloading vessels other than at Pier 22. RBT has no involvement or interest in these activities. For its part, RBT says that there is no evidence to show that this work was already on going at the Port of Hamilton at the time relevant to this application. In other words, these self-unloading vessels may have discharged salt for Cargill only after December 2009. Moreover, RBT says that this case may be distinguished by the fact that the salt discharged for Sifto at Pier 22 is discharged onto a facility that Sifto leased from the Port of Hamilton for its sole use; there is no evidence that Cargill leases the space where the salt was discharged at the Port of Hamilton.

[80] Self-unloading vessels discharge bulk commodities other than road salt, namely sugar, at the Port of Toronto. The ILA or union other labour is involved in the discharge of the sugar. RBT has no involvement or interest in the discharge of the sugar.

[81] No geographic certification for the longshoring industry is in effect at the Port of Toronto.

[82] Self-unloading vessels discharge road salt at the Port of Montréal for Canada Salt. Canada Salt is directly involved in the discharge process and uses its own employees. Neither the ILA nor other union labour is involved. Again, RBT has no involvement or interest in this discharge of salt.

[83] There is a geographic certification order in the longshoring industry in effect at the Port of Montréal.

**VI–Positions of the Parties**

**A–The Applicant and the Intervenor**

[84] There is no serious dispute between the parties as to what the RBT employee was doing at Pier 22 in December 2009 prior to, during or after the discharge of the salt from the self-unloading vessels.

[85] There is also no serious dispute between the parties as to what RBT does, as a corporation, on a day-to-day basis at the four other ports and at the two inland terminals where it provides its services, primarily related to the handling of road salt.

[86] The parties differ, of course, as to whether the RBT employee at Pier 22 was performing longshoring work and as to whether RBT is an employer in the longshoring industry within the meaning and scope of the geographic certification order in effect at the Port of Hamilton.

[87] The positions of the MEA and the ILA are essentially similar, at least with respect to the primary issues in dispute in the MEA application.

[88] The MEA and the ILA both adopt a similar definition of longshoring. They say that it is understood in the industry that longshoring is the removal of goods from the hold of the ship, to the brow, to the tailgate, by a third party (unloading) and the reverse (loading). "Tailgate" refers to a part of the truck (or to a similar part of the railcar) involved in the inland portion of the transportation of the goods by water. That would be the truck or the railcar that transports the subject goods from their point of origin to the port or from the port to their point of destination.

[89] The MEA and the ILA say that Mr. Bennett, the RBT employee present at Pier 22 during and after the discharge of the salt from the self-unloading vessels, was performing longshoring work.

They say that the stevedoring work begins when the salt lands on the pier. They say that longshoring work includes the unloading of the salt as the RBT employee directs the placement of the boom, the building of the pile with the bulldozer and, sometime later, the loading of the salt onto trucks and the scaling thereof. The MEA and the ILA acknowledge that RBT employees were not involved in tarping (and untarping) the piles of salt but say that this work too is longshoring.

[90] The MEA and the ILA say that the evidence demonstrates that RBT is an employer in the longshoring industry. RBT is routinely involved, according to the MEA, in unloading and loading vessels at a port. It participates in the unloading of salt, from self-unloading vessels in Hamilton as well as at other ports in Ontario. The MEA reminds the Board that RBT unloads salt for customers other than Sifto and that the salt that RBT unloads at other ports in Ontario for Cargill originates from a point in the United States. One of the services that RBT performs is the loading of aggregates into self-unloading vessels and it does this at the port in Johnstown, Ontario.

[91] The MEA agrees with and accepts the RBT position that the work that RBT does for Sifto at Pier 22 is no different than the work that RBT performs for its other salt customers at other ports in Ontario. RBT says that this similarity supports RBT's position that its activities have nothing to do with longshoring. The MEA, to the contrary, says that the similarity of the work at Pier 22 with the work that RBT does at other ports clarifies and confirms that RBT and its employees are engaged in longshoring work on a routine and daily basis at other ports throughout Ontario. At the same time, the MEA points out to the Board one significant difference, namely that Hamilton is the only one of those ports that is subject to a geographic certification order. Moreover, the MEA says it established during cross-examination that the RBT General Manager was not aware of the existence of the geographic certification order at the time that RBT was performing the disputed work at Pier 22.

[92] The MEA and the ILA reject the RBT argument that the Sifto lease of Pier 22 at the Port of Hamilton is relevant to the determination of whether the work performed at the pier by the RBT employee was or was not longshoring.

[93] The MEA also rejects the RBT argument that the determination of whether RBT is engaged in longshoring depends on whether RBT provided its services at the pier pursuant to a contract with the ship or its agent. The MEA does not accept the RBT argument that work at the pier can only be considered longshoring if the work is performed before the contract of carriage of the goods by water comes to an end, according to a provision in that contract that stipulates the time or the point at which the contract comes to an end.

[94] The ILA addresses, in greater detail, the basic constitutional characterization of the work, using the language found in the *Stevedoring Reference of 1955*. The ILA says that all of the work performed by RBT employees at Pier 22, work which the ILA identifies as longshoring, as well as the tarping and untarping of the piles by another third party, is work that is integral to navigation and shipping. Stated another way, the ILA argues that without the work of RBT at the Port of Hamilton, the transportation of the salt would never have been completed. The ILA sees this work as integral to the marine transportation of the goods and integral to the shipping of the salt by Sifto.

[95] The positions of the MEA and the ILA did differ in one respect. The ILA urges the Board to adopt one comprehensive and global definition of longshoring to provide guidance to ensure, ideally, that the parties working at the Port of Hamilton do not have to keep coming before the Board to clarify the scope of the geographic certification order at the Port of Hamilton. The MEA is content with a narrower focus, restricted to the issues immediately raised by its application, which, after all, is aimed towards collecting the assessments and charges that the MEA claims that RBT owes to it.

**B–The Respondent**

[96] RBT opened its legal argument by framing the question before the Board in two parts: the first was whether RBT was "actively engaged" in longshoring work at Pier 22. When RBT frames this question, it makes reference to the discharge of salt in bulk for Sifto at the Sifto terminal in December 2009. If the Board finds that RBT was actively engaged in longshoring, then the second question is whether RBT is subject to federal jurisdiction. RBT answers both of these questions in the negative. RBT says that the scope of what activities constitute longshoring is not an easy question to deal with; RBT points to the evolution in the case law since the *Stevedoring Reference of 1955*.

RBT also mentions that its witness, Mr. Daoust, with some 31 years of experience in the industry, is himself uncertain as to the exact scope or boundaries of longshoring work. RBT reminds the Board that self-unloading vessels did not exist back in 1955.

[97] In argument, RBT places considerable emphasis on the contract of transportation of goods by water and even greater emphasis on the time when that contract comes to an end. In that regard, RBT directs the Board to the *Cargill* case, in which the Federal Court of Appeal noted that the contract of carriage had come to an end before Cargill workers started to handle the grain (see the *Cargill* case at paragraphs 12 and 27).

[98] The RBT thesis is essentially that in order for a disputed activity to be essential and integral to the work of the federal undertaking, then the activity must be performed within the scope of the contract of carriage of goods by water. In other words, to be "federal," the activity must be performed before the contract comes to an end. Longshoring activity, according to RBT, will be federal only if it is performed within the terms and conditions of the contract of carriage by water and before the contract comes to an end.

[99] RBT asserts that the idea that the contract of carriage ends at the end of the boom is a common contractual provision found in contracts for the carriage of goods by self-unloading vessels. According to RBT, both the MEA and the ILA admitted that the contract of carriage of the Sifto salt in question ended at the end of the ship's boom as the salt falls to the ground at the port. RBT reminds the Board that it obtained this admission from the MEA and the ILA in exchange for RBT's consent to allow the MEA to introduce the three affidavits into evidence. Consistent with its argument that the contract of carriage is at an end when the salt falls onto the pier, RBT states that the contract of carriage provided that the cargo had to be delivered to the consignee in this case, Sifto at the terminal it leased in Hamilton from the Port Authority, namely Pier 22.

[100] It is at this point in the discharge process that RBT raised the analogy of the distribution centre. Once the salt was discharged from the end of the boom by the self-unloading vessel, what Sifto was doing, according to RBT, was running a distribution centre at Pier 22. Sifto has a pile of road salt at Pier 22 and it gets orders, from time to time, from its customers to deliver certain lesser quantities

of salt to them by truck. According to RBT, Sifto subcontracts with RBT to assist Sifto in running its distribution centre. Therefore, Mr. Bennett went to Pier 22, according to RBT's legal argument, merely to assist Sifto in running its distribution centre.

[101] In other words, RBT argues that its employees are not involved in the loading or unloading of ships at Pier 22. Rather, it is merely a subcontractor to Sifto in the operation of Sifto's distribution centre.

[102] Each truckload of salt leaving the pier has to be "scaled" to allow Sifto to determine the quantity of salt that is leaving the distribution centre and to enable Sifto to invoice its customers appropriately. RBT emphasizes that it does not own or operate the scale or the computer used in this phase of the process. RBT points to the scaling operation and to the related invoices as evidence of a new and discrete contractual relationship between Sifto and its customer. RBT says that it is not a party to the contract of carriage by water. RBT similarly says that it is not a party to the contract between Sifto and its customers for the subsequent delivery of salt from the distribution centre.

[103] RBT also sees the departure of the self-unloading vessel from the pier as consistent with its thesis. The work of RBT, and other subcontractors, continues after the vessel has discharged its cargo and has left the pier.

[104] RBT submits that the responsibility of the water carrier under the contract of carriage ends when the last piece of salt leaves the end of the boom. The vessel leaves the port once all the salt has been discharged and, from the perspective of the contract of carriage, whatever happens to the salt thereafter is of no concern or interest to the water carrier. Once the last piece of salt has left the boom, the cargo has come into the care, custody, possession and control of Sifto as consignee. RBT argues that the type of work that Sifto saw fit to subcontract to RBT, namely the building and the levelling of the pile (or to other third-party subcontractors for the tarping of the pile), was in the nature of distribution of salt and has nothing to do with longshoring.

[105] The communication between the RBT employee and the operator of the boom on the ship related to the movement of the boom also does not to constitute longshoring, according to RBT. The

respondent says that Mr. Bennett's evidence in that respect was clear: the RBT employee present on the dock during the discharge of the salt is not directing the crew in how to operate the machinery used for the unloading of the cargo and is not instructing the crew on how to unload the cargo. RBT says that the instructions it gives over the ship's walkie-talkie to the operator of the boom is merely on how to create a pile that will be easier to deal with for tarping purposes, and that the instructions have nothing to do with how the cargo is to be unloaded from the ship. Finally, RBT says that the ship has no obligation to follow the instructions given to it by the RBT employee over the walkie-talkie.

**VII–Analysis**

**A–Issue One: Whether Intra-Provincial Shipping?**

[106] The Board finds, and there is no serious dispute, that the two vessels that discharged road salt at Pier 22 on the two dates relevant to this application were routinely engaged in the interprovincial and international transportation of goods by water. RBT has therefore not proved one of the fundamental conditions precedent to the creation of the intraprovincial shipping exemption: that the shipping occurs solely within the geographic boundaries of one province. Mr. Justice Rothstein of the Federal Court of Appeal (as he then was) stated that:

> 49. *Dicta* in the *Stevedores'* case supports the view that shipping within the limits of a province is under provincial jurisdiction.
>
> ...
>
> The indication is that stevedoring or longshoring related to shipping wholly within the limits of one province is not subject to section 34 of the *Canada Labour Code*.
>
> (*Halifax Longshoremen's Association, Local 269* v. *Offshore Logistics Inc.*, (2000), 257 N.R. 338; (2000) 25 Admin. L.R. 224; [2000] CLLC 220-047; and 61 CLRBR (2d) 180 (F.C.A.), at paragraph 49; see also the *Stevedoring Reference of 1955* at page 542 and *Agence Maritime Inc.* c. *Conseil Canadien des Relations Ouvrières et al.*, [1969] R.C.S. 851, at page 859)

[107] Accordingly, the Board finds that neither the cargo nor the activities of RBT during the discharge of self-unloading vessels at Pier 22 in Hamilton, Ontario, on December 16 and December 26, 2009, are subject to the intra provincial shipping exemption.

**B–Issue Two: Whether Long-shoring?**

[108] The Board is satisfied that the work performed by the RBT employee at Pier 22, prior to and during discharge as well as the day following, was longshoring.

[109] The Board finds, and again it is not seriously disputed, that an employee of RBT arrived at Pier 22 sometime prior to the arrival of the self-unloading vessels that unloaded the cargo of salt. The Board further finds that the same employee remained at the site throughout the entire discharge process (a period of six or seven hours) and that, also throughout that entire period, he remained in contact and communication with a member of the ships' crew by means of the ships' communication systems. The MEA and the ILA both assert that these activities constitute longshoring. RBT says that they do not. RBT says that its employee is at the pier merely to guide the boom operator on the ship so that the piles of salt will be placed in a more orderly fashion in the desired location and within the proper boundaries on the pier. The proper placement of the piles of salt facilitates the subsequent RBT task of levelling the salt pile with a bulldozer. The levelling of the pile facilitates, in turn, the tarping of the pile, whether that work is performed by RBT or another party.

[110] The *Cargill* case reminds us that we need only refer to the ordinary meaning of the word longshoring to define it. As noted above, the Federal Court of Appeal defined longshoring as "basically the operation of loading and unloading ships" and that, in some cases, as ancillary to this principal operation, it may also include the handling and storage at dockside of goods that have been loaded or unloaded.

[111] More specifically, the Board finds that the RBT employee was a third party engaged, at all times when he was present at the pier, in the unloading of the road salt from the self-unloading vessel. The evidence that the Board heard over three days at the hearing was more than sufficient to give the Board an insight into the nature of the operations of all parties at Pier 22. From that

evidence, the Board finds that the unloading of a cargo of salt from a vessel, even where that type of vessel is referred to as "self-unloading," is a continuous and consecutive continuum of events. It is more than a single activity. In the case before the Board, it is a series of events that follow one after the other.

[112] The RBT evidence at the hearing focused primarily on the communication between the RBT employee and the member of the ship's crew regarding the positioning of the boom while the salt was being discharged. The Board sees this communication as a key part of unloading the vessel. It is a joint effort or undertaking of the RBT employee and the member of the ship's crew. The Board finds it is a process that takes over six consecutive hours to complete. The involvement of the RBT employee in that activity is not simply discretionary or a mere convenience, as the respondent would have it. It was part of unloading the road salt.

[113] The unloading of this particular bulk cargo, road salt, did not end when all of the road salt had been discharged from the hold of the vessel and was in a pile on the pier. The Board finds that the actual discharge was only one part of the unloading; it was one part of the continuum of activities that constituted the unloading of the cargo from the ship at the Port of Hamilton.

[114] The process of unloading the vessel started, from the perspective of RBT, when its employee contacted the vessel to determine the approximate arrival time at port. It continued through communication by walkie-talkie over several hours to position and reposition the boom to build the pile of salt in the correct location and in the desired configuration.

[115] The respondent attached some importance to the departure of the vessel. Much of the work of the RBT employee took place after the departure of the vessel. RBT seemed to take the position that the unloading of the vessel necessarily was at an end once the vessel completed the discharge of the cargo and left the port; the respondent took the position that any work done by the RBT employee to the cargo on the dock thereafter could not be considered longshoring work. In the specific case before it involving the unloading of road salt, the Board does not agree. The RBT employee returned to the pier the very next day to use a bulldozer to level the pile. It was the same pile he had played a key role in building the day before. The work of levelling the pile was done to facilitate the next

step in the process, that is, the tarping of the pile. Again, the Board sees all of these activities for this commodity as part of a continuum of longshoring.

[116] As the Board understands the evidence and the specific nature of the cargo, all of these steps had to be completed apace in order to protect the road salt from the wind and the rain. Stated another way, RBT did not have the ability or the option to wait six weeks or six months before returning to the pier to level the pile. It had to be done promptly and in the Board's view, it therefore formed part of the discharge of the cargo from the vessel onto the pier. Having regard to the definition of longshoring cited above, the Board finds that the work of the RBT employee in using a bulldozer to level the pile was part of the operation of unloading this particular type of cargo from the ship. If the Board is wrong in that finding, then the levelling of the pile certainly comes within the sort of handling of the cargo at dockside that is ancillary to its unloading. It is part of an unbroken chain of activities. It is part of the longshoring work.

[117] The tarping of the pile followed the levelling of the pile. The RBT employee did not perform the tarping work at issue in this proceeding. RBT's price quote to Sifto (exhibit 1, tab 1) concluded, however, by indicating that RBT was prepared to quote a price on the tarping work upon request. The Board makes no formal finding on whether the tarping work was or was not part of the continuum of longshoring work performed at Pier 22. It is, however, necessary for the Board to take notice of the fact that the salt discharged from the vessels was covered with a tarp. This is necessary to address RBT's argument that its work was part of operating Sifto's distribution centre on the pier and had nothing to do with longshoring.

[118] The Board turns now to consider RBT's arguments as to why the work its employee was doing at the pier was not longshoring.

[119] RBT submits, in effect, that longshoring may not be defined by the ordinary meaning of the word. RBT adopts a technical or a legalistic definition of longshoring; it can only be defined, according to RBT, by having regard to the identity of the parties to the contract of carriage of the goods by water, the time at which that contract comes to an end and the time when the risk in the cargo passes to the consignee and to the consignee's lease of the pier from the Port of Hamilton.

[120] The Board does not dispute the fact that RBT was not a party to the contract of carriage of the goods by water or that its services were not retained by the ship or its agent. The Board does not dispute that the contract of carriage may contain a provision that the contract is at an end once the salt falls from the end of the boom or that such clauses are commonly found in contracts of carriage involving self-unloading vessels. The Board does not dispute that Sifto leased Pier 22 from the Port of Hamilton or that the lease may provide Sifto with exclusive use of the pier and that, by extension, RBT would not have been able to participate in the unloading of any other vessels or cargos without Sifto's consent.

[121] Having said all of that, the Board is of the view that these distinctions have no legal significance to the determinations that this Board is required to make in this proceeding; the Federal Court of Appeal rejected essentially the very same arguments in 1988. In *Terminaux Portuaires du Québec Inc.* v. *Maritime Employers' Association*, (1988) 89 N.R. 278; and (1988) 89 CLLC 14,009 (F.C.A.), the Court stated that it was the nature of the activities themselves that mattered and, accordingly, held that it was of no consequence whether one was or was not dealing directly with the carrier or whether the port facilities were public or private:

> ... [I]t is interprovincial or international maritime transportation that is within federal jurisdiction and it is the activities inherent in and necessary to such transportation that Parliament has the power to regulate, and the legal personality of those engaged in such activities, the public or private nature of the port facilities where they carry on their trade and the origins or content of the contracts under which they act cannot change this in any way. ...
>
> (pages 290; and 12,051)

[122] The Court was composed of two of the three members of the same bench who rendered the *Cargill* decision in 1983.

[123] Consistent with that finding of the Federal Court of Appeal, the Board would add the following observation that emphasizes the importance of considering, first and foremost, the nature of the activities that are observed taking place in a port. A geographic certification order in the longshoring industry is in effect at the Port of Hamilton. It has been in effect since 1991. All parties

in this proceeding are sophisticated and experienced in all aspects and matters related to the transportation of goods by water. While it is true that RBT may never have provided its services in a port subject to a geographic certification order before, it is also true that by November 2009, it had a general manager with decades of experience in longshoring, including such experience in other ports subject to a geographic certification order.

[124] Vessels arrive and depart from such ports frequently. The question of whether someone involved in the unloading of a vessel at such a port is or is not an employee of an employer in the longshoring industry is intended to be readily resolved by the interested parties themselves, based on their knowledge and experience of the industry and the port in question. Given the immediacy of the labour relations aspect of the problem, it is intended that the interested parties are able to make that determination themselves, quickly and accurately, based on the application of their day-to-day knowledge of the industry to what they see happening in the port. Stated another way, for labour relations issues at the port to function smoothly, the interested parties should not be expected or required to inspect the contract of carriage of the goods by water or ascertain whether there is a lease in effect for a given pier within the general territory of the port. For the system to work efficiently, once a geographic certification order is in effect at a port (and especially once it has been in effect for almost 20 years), the determination of whether someone is or is not an employee engaged in longshoring work within the scope thereof should not require recourse to legal counsel or to a hearing before this Board. It is the nature of the activities that matter.

**C–Issue Three: Whether RBT is an employer in the longshoring industry?**

[125] The Board is satisfied that RBT is an employer in the longshoring industry in the Port of Hamilton within the scope and meaning of the geographic certification order.

[126] As previously stated, the essence of longshoring is the loading and unloading of ships, including the necessarily incidental activities of handling and storage of the goods, which have been loaded or unloaded, at dockside. As noted by the CLRB in its 1991 decision in *Maritime Employers' Association et al. (857)*, *supra*, granting the geographic certification, the employers who "send out or receive products on their own account" are outside the scope of the

geographic certification order while those who "are in the business of contracting to load or unload ships for others for remuneration" come within its scope. RBT is in the business of contracting to load or unload ships for others for remuneration.

[127] The documentary evidence itself is sufficient to support such a finding; the *viva voce* evidence of RBT's General Manager confirms it. RBT was engaged, through its employee, in the unloading of the salt from the self-unloading vessels at Pier 22 and in ancillary activities. RBT was not doing so on its own account. RBT was doing so under contract for Sifto for remuneration. The evidence also proves that RBT is engaged in both the loading and the unloading of salt, as well as other commodities, at other ports in Ontario. Significantly, there is no geographic certification order in effect at the other ports in Ontario where RBT provides its services. That RBT may have been unfamiliar with the implications of a geographic certification order is not a reason to find that it was not involved in longshoring at Pier 22.

[128] The RBT Website has a page that identifies one of its services as vessel loading and unloading at ports on the St-Lawrence Seaway. The press release says RBT's "main activity," at four ports, is "to receive road salt from self-unloaders... and do the stockpiling, storage and truck loading for three major salt companies serving [E]astern Canada." Before the RBT work at Pier 22 began, RBT's letter quoting Sifto a price for its services indicated that it "would also have someone there to unload the vessel." Once RBT performed the work at Pier 22, RBT invoiced Sifto for its services, which it described, in part, as "to receive and unload vessel load of road salt." The *viva voce* evidence of Mr. Levebvre confirmed that RBT was so engaged at Pier 22 as well as at other ports in Ontario. He confirmed that RBT also loads aggregates at one of the ports.

[129] Having heard and considered all of the evidence, the Board does not accept RBT's legal argument that the terms "to receive" and "to unload" road salt somehow have a special and distinct meaning when RBT, rather than a longshoreman, performs the work. The Board is of the view that the ordinary meaning of the word "longshoring" encompasses the services that RBT provided "to receive" and "to unload" road salt at Pier 22.

[130] At what point then, having regard to the *Cargill* case, does the activity of RBT employees on the pier cease to be longshoring?

[131] RBT relies upon the *rationale* of the *Cargill* case for the proposition that longshoring does not extend to or include the handling of a commodity, even on a pier, when the maritime transport has ended, the goods have arrived at their destination and the recipient is in possession of them (see paragraph 12). In the *Cargill* case, these three steps had been accomplished and the unloading of the grain from the self-unloading vessel was at an end once the grain had been emptied into hoppers (paragraph 27).

[132] As the Board understands it, RBT adopts the *rationale* of the *Cargill* case to argue that these three steps were achieved all at the same time on December 16 and again on December 26: the maritime transport ended, the goods arrived at their destination, Pier 22, and the recipient, Sifto, was in possession of them, once the salt fell from the end of the boom during discharge. Simply put, RBT says that salt falling from the end of the boom at Pier 22 is the legal equivalent of the hoppers at the Port of Quebec that held Cargill's grain. Consistent therewith, RBT argues that Sifto was, at all material times, operating a distribution centre at Pier 22 and that Sifto had contracted with RBT to operate the distribution centre on its behalf. According to this argument, neither Sifto nor RBT were engaged in longshoring at any time.

[133] While the Board accepts the *rationale* of the *Cargill* case, the Board cannot accept the manner in which RBT applies it to the evidence of the activities at Pier 22 for this particular commodity. The Board is not satisfied that the two situations are equivalent. The Board has found at section VII B of these reasons for decision that longshoring of salt at Pier 22 was a continuum of events and that the continuum included the RBT employee building the pile and levelling the pile with the bulldozer. To determine all of the relevant matters before it in the MEA application, the Board needs to go no further. By way of *obiter dictum*, if the Board had been required to determine, as the Federal Court of Appeal did in Cargill, the point at which a distribution centre, if any, came to exist at Pier 22, that point would not reasonably have been reached until such time as the piles of salt had been tarped. A pile of salt that has been levelled and tarped on a pier would seem to have certain significant

similarities, at law, to grain that had been emptied into hoppers at a port. That said, the Board makes no finding in that regard since the nature of this application does not require the Board to do so.

[134] Is RBT required to be "actively engaged" in longshoring, as it claims?

[135] In its argument, RBT stated that the first issue for the Board to determine is whether RBT was an employer "actively engaged in longshoring." As amended effective January 1, 1999, section 34(1) of the *Code* contains the words "actively engaged." It is true that section 34(1) of the *Code* bestows upon the Board a discretion to determine whether "employees of two or more employers actively engaged in the [longshoring] industry in the geographic area constitute a unit appropriate for collective bargaining." In other words, as the Board understands it, "actively engaged" is a term that describes the activities of the employer at issue at the time the Board is seized of the application for a geographic certification order. Before the Board may grant a geographic certification order, it must be satisfied that two or more of the employers are actively engaged in the relevant industry. At the Port of Hamilton, the CLRB made the decision on geographic certification in 1991. That is no longer an issue for this Board when assessing the RBT activities that occurred at Pier 22 in December 2009.

[136] At this time, the issue before the Board is to construe the description of the bargaining unit set out in the geographic certification order and to determine whether the employer is or is not within its scope. The relevant words in the description of the geographic certification order dated March 8, 1991, are: "all employees of the employers in the longshoring industry at the Port of Hamilton employed as longshoremen." Stated another way, the words "actively engaged" are not part of the description of the bargaining unit. Accordingly, it is sufficient for the Board to determine, as it has done herein, that RBT is an employer in the longshoring industry at the Port of Hamilton. There is no requirement for the Board to determine, at this time, whether RBT is an employer "actively engaged."

[137] In any event, it would defeat the intent and purpose of a geographic certification order if a third-party employer could, on the one hand, have one or more employees engaged in longshoring while, on the other hand, avoid the scope of the geographic certification order by claiming that the employer was engaged in longshoring but somehow less than "actively engaged" in longshoring. The

geographic certification order creates what the CLRB described in its 1991 decision in *Maritime Employers' Association et al. (857)*, *supra*, as a "single labour pool." The intent and purpose of the geographic certification order does not allow occasional entry into the single labour pool created by that order by employees on the basis that their third-party employer is only sporadically engaged in longshoring (see *Secunda Marine Services Limited*, 1999 CIRB 16). In this regard, the Board adopts the mischief analysis from its decision in *Secunda Marine Services Limited*, *supra*:

> [73] ... If an exception to the geographic certification is justified in Offshore's case, any corporation, by contracting in a similar way with a local corporation to carry out its transportation and longshoring work and combining the longshoring with additional logistical and support work could circumvent the geographic certification and the *Code*'s purposes. If such work were incidental and occasional only, and integrated with the primary business of the entity undertaking it, it might well escape section 34. However, all longshoring work requires careful scrutiny. Based upon a careful balancing of factors, an employer doing longshoring work at some point will find that its employees are employed in the longshoring industry within the meaning of the *Code*.

[138] If the Board is wrong in its construction of the words "actively engaged" at section 34(1) in the context of this application, then the Board would have no hesitation in finding that RBT is an employer actively engaged in the longshoring industry. Certainly, its employee at Pier 22 was actively engaged in longshoring activities at all material times. RBT provides longshoring services. RBT also provides other services to other customers at other locations that are not longshoring services. An employer may be actively engaged in longshoring without being exclusively engaged in longshoring. The evidence satisfies the Board that, while RBT may provide some services that do not constitute longshoring, RBT does perform a number of longshoring activities at a number of locations for a number of customers. It is an employer actively engaged in longshoring.

**D–Issue Four: Remedy**

[139] Given the above determinations, the MEA is entitled to a remedy.

[140] In practical terms, the MEA obtained a not insignificant form of redress when it served its Board application on RBT on or about February 16, 2010. In the course of an exchange of correspondence explaining its position that it was not engaged in longshoring and would not be

paying the various MEA invoices, RBT informed the MEA by letter dated April 7, 2010 (exhibit 5, tab 24), that:

> ... [RBT] has ceased its activities at the Port of Hamilton in February [2010] and has no intention of resuming any activity at the Port of Hamilton unless the MEA accepts the position of [RBT] and abandons its [CIRB] application.

[141] The Board therefore understands that RBT's activities at the Port of Hamilton were related only to the salt that was unloaded at Pier 22 on December 16 and 26, 2009.

[142] Since the Board finds that RBT was an employer within the scope of the geographic certification order, the MEA has the power, pursuant to section 34(5.1), as employer representative under that order, to require RBT to remit its share of the costs that the employer representative has incurred in fulfilling its duties and responsibilities under Part I of the *Code*. In terms of the prayer for relief in the MEA application, the Board directs the MEA and RBT to consult and to quantify the amount of the tonnage-based assessment and the deficit recover that is outstanding. The Board also directs RBT to pay those amounts to the MEA as soon as possible and, in any event, no later than 15 days after the date of these reasons for decision.

[143] The Board heard evidence that the MEA assessments are, in part, based on the tonnage of road salt discharged on December 16 and 26, 2009, at Pier 22. The MEA invoices to RBT are on the record of the proceeding. Those invoices also disclose that the MEA is seeking to recover from RBT a portion of its deficit at the Port of Hamilton for the period ended February 28, 2010. The Board understands that RBT is familiar with the tonnage-based assessments used by the MEA. Moreover, the amounts in dispute are, in relative terms, modest. RBT's opposition to the payment of the amounts was based primarily on its jurisdictional concerns, which has now been resolved in favour of the MEA. Accordingly, the Board expects that there will be no significant debate between RBT and the MEA regarding quantification and payment of all of the amounts outstanding.

[144] If the parties cannot agree on the amount to be paid, the Board will convene a teleconference to determine the next steps to assist with the quantification and related issues. If the Board is ultimately required to quantify the amounts, it will do so. The Board accordingly retains jurisdiction over the remedy portion of this proceeding.

[145] The MEA also asked for a cease and desist order. Consistent with the portion of RBT's April 7, 2010, letter reproduced above, the Board understands that RBT ceased to perform any work at the Port of Hamilton in February 2010 and has no intention to resume. Of course, if RBT chooses to resume any activities within the Port of Hamilton, it will have to do so in a manner consistent with the geographic certification order and with these reasons for decision. Accordingly, the Board is of the view that there is no need for a formal cease and desist order.

**E–Issue Five: Costs**

[146] In its prayer for relief, the MEA also sought the "full legal costs" associated with this application. The Board heard arguments on the question of whether it has the power to award legal costs, and if so, where the statutory source of that power is to be found. As previously noted, section 34(5.1) of the *Code* expressly refers to "costs" where it enables an employer representative to require each employer to remit its share of the costs the employer representative has incurred. It is far from clear whether that statutory language empowers this Board to make an award of legal costs to a successful party in a proceeding before it. The meaning of "costs" in section 34(5.1), and the question as to whether it includes legal costs, has not previously been judicially considered nor, to the Board's knowledge, has it been considered by this Board. The parties did address these questions in argument, but the Board did not find those arguments to be sufficiently comprehensive to allow the Board to determine this issue. Accordingly, the Board has decided to reserve its determination on the question of costs. The Board expects that the parties would be able to resolve this matter themselves. If the parties are not able to do so within the 15-day period following the date of these reasons for decision, the Board will issue further directions, potentially including the need for further written legal submissions from the parties. The Board retains jurisdiction over all aspects of the question of costs.

**VIII–Conclusion**

[147] For the reasons given above, the Board grants, in part, the MEA application. The Board finds that the RBT employee was engaged in longshoring at Pier 22 on the dates relevant to this proceeding. The Board also finds that RBT is an employer in the longshoring industry within the meaning and scope of the geographic certification order dated March 8, 1991. It follows, therefore, that RBT is required to pay the MEA assessments and related charges to the MEA related to the salt that was discharged at Pier 22 on or about December 16, 2009 and December 26, 2009.

[148] The Board will leave it to RBT and to the MEA to quantify all of the amounts of the MEA assessments and related charges in dispute. The Board directs RBT to pay those amounts to the MEA within 15 days of the date of these reasons for decision. If the parties are unable to agree on the amounts, the Board will either quantify or will assist the parties in the quantification of the outstanding amounts. The Board accordingly retains jurisdiction over the remedy portion of this matter and over all aspects of the question of costs.

William G. McMurray
Vice-Chairperson

John Bowman
Member

Patrick J. Heinke
Member